No. 90-705

JAN 31 1991

JOSEPH F. SPANIOL, JR.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

CLIPPER CITY LODGE NO. 516, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Board reasonably found that the union violated Section 8(b)(1)(A) and (2) of the National Labor Relations Act, 29 U.S.C. 158(b)(1)(A) and (2), by maintaining and enforcing a contract clause denying accrued seniority to an employee because of his failure to pay union dues while he was outside the bargaining unit covered by the contract.

2. Whether the Board reasonably found that Section 10(b) of the Act, 29 U.S.C. 160(b), did not bar a determination that a union committed unfair labor practices by maintaining and enforcing that clause during the six-month limitations period prescribed by that Section.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 909 F.2d 963. The decision and order of the National Labor Relations Board (Pet. App. 20a-41a) are reported at 291 N.L.R.B. No. 122.

JURISDICTION

The judgment of the court of appeals (Pet. App. 19a) was entered on August 2, 1990. The petition for a writ of certiorari was filed on October 31, 1990.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. At all times relevant to this case, petitioner, Clipper City Lodge No. 516, District 10, International Association of Machinists and Aerospace Workers, AFL-CIO, represented certain employees of Manitowoc Engineering Company (the Company). Pet. App. 20a. Article V, Section 17, of the collective-bargaining agreement between petitioner and the Company permitted unit employees promoted or transferred to positions outside the bargaining unit to retain seniority accrued while in the bargaining unit, and provided that such employees "will be permitted to return to the bargaining unit unless good cause is shown and provided." *Id.* at 21a. However, the agreement went on to state that any such employee "shall maintain membership in [petitioner] or obtain a withdrawal card in accordance with * * * [petitioner's] Constitution." *Ibid.* The relevant constitutional provision stated that any member of the international union with which petitioner was affiliated who met certain conditions "*may* be issued an honorary withdrawal card by and with the approval of the [local lodge] in which membership is held." *Id.* at 21a n.1 (emphasis added).

Eugene Ruppelt was a bargaining unit employee from 1942 until 1972, when he became a foreman, a supervisory position outside the bargaining unit. He then requested a withdrawal card from petitioner, but petitioner's membership rejected the request on the recommendation of the shop committee chairman, who had previously quarreled with Ruppelt. Thereafter, Ruppelt stopped paying dues to petitioner. However, the Company continued to list his name on

periodic rosters showing the seniority possessed by former bargaining unit employees working outside the unit. Pet. App. 22a.

On January 3, 1986, the Company transferred Ruppelt back to a position within the bargaining unit. Petitioner protested that Ruppelt had no seniority, since he had not obtained a withdrawal card or paid dues, and maintained that he should not be allowed to work, since several unit employees were on layoff status. The Company, accepting petitioner's position, laid off Ruppelt on January 14. Pet. App. 5a, 23a.

After Ruppelt protested his layoff, the Company recalled him on April 11. Petitioner filed a grievance, asserting that the recall of Ruppelt with full seniority violated the collective-bargaining agreement. An arbitrator ruled that, under the "clear and unambiguous language" of Article V, Section 17, Ruppelt had forfeited his bargaining unit seniority by failing to pay dues while he was a supervisor. On July 11, 1986, the Company again laid off Ruppelt. Pet. App. 5a, 23a-24a & n.4.[1]

2. Ruppelt filed an unfair labor practice charge against petitioner on June 24, 1986. Pet. App. 6a. On the basis of this charge, the Board's General Counsel issued a complaint against petitioner. *Ibid.* The Company was the subject of a later charge and complaint, which were consolidated with the case involving petitioner. *Ibid.*

a. Applying the three-step test set forth in *IBEW Local 1212*, 288 N.L.R.B. 374, 376 (1988), aff'd

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[1] The Company filed suit in the United States District Court for the Eastern District of Wisconsin to vacate or modify the arbitration award. The suit has been held in abeyance pending the resolution of the instant unfair labor practice proceeding. Pet. App. 5a-6a n.1, 24a n.5.

sub nom. WPIX, Inc. v. *NLRB*, 870 F.2d 858 (2d Cir. 1989), the Board held that Article V, Section 17, was unlawful on its face.[2] The Board found that the clause treated employees differently with respect to seniority rights on the basis of whether or not they paid union dues and thus inherently encouraged employees to participate in that union activity. Pet. App. 30a-31a. Further—after noting that petitioner had substantial discretion to grant or deny a withdrawal card and that employees had to get a withdrawal card in order to preserve valuable seniority rights without undertaking a financial obligation—the Board also concluded that the contract encouraged employees to remain in petitioner's good graces while still in the bargaining unit. *Id.* at 31a n.13. Finally, the Board found that the clause was not justified by the policies of the Act, since it did not further the effective administration of collective-bargaining agreements, but simply enabled petitioner to collect dues from individuals whom it was not then representing. *Id.* at 32a.

The Board also determined that the provision could not be upheld as a valid union-security provision authorized by the proviso to Section 8(a)(3). The Board explained that the proviso does not authorize discrimination based upon an individual's failure to pay dues at a time when (as was the case with Ruppelt here) the employee has no contractual obligation to make such payments as a condition of employment. Pet. App. 33a. Further, the Board continued,

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[2] That three-step inquiry consists of the following questions: (1) Does the clause treat employees differently with respect to a term or condition of employment on the basis of union membership? (2) Does the difference in treatment encourage union membership? (3) Is the disparate treatment justified by the policies of the Act?

a valid union-security clause may not authorize discrimination other than termination of an employee for nonpayment; here, the contract purported to authorize denial of seniority for nonpayment. *Ibid.*

Accordingly, the Board found that the Company violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1), and that petitioner violated Section 8(b)(2) and (1)(A) of the Act, 29 U.S.C. 158(b)(2) and (1)(A), by maintaining Article V, Section 17 of the contract and by applying it to lay off Ruppelt. Pet. App. 33a.[3]

b. The Board rejected petitioner's contention that Section 10(b) of the Act, 29 U.S.C. 160(b), which requires the filing of a charge within six months of an unfair labor practice, foreclosed it from adjudicating those violations. The Board explained that the conduct at issue was not the denial of a withdrawal card, which occurred in 1972, but rather the actions petitioner took, within the six months preceding Ruppelt's charge, to cause Ruppelt to be laid off. Pet. App. 34a-35a. The Board acknowledged that Section 10(b)'s six-month limitations period runs from the date of an allegedly unlawful act, rather than the date its consequences became effective, provided that a final and unequivocal adverse employment decision is made and communicated to the employee. But the Board found that no final adverse decision or action was taken with respect to Ruppelt's employment un-

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[3] In the instant case, the Board (Pet. App. 29a) overruled *Brown & Williamson Tobacco Co.*, 227 N.L.R.B. 2005 (1977), and returned to the position previously taken in *Steelworkers Local 1070*, 171 N.L.R.B. 945, 946 (1968), and *Kaiser Steel Corp.*, 125 N.L.R.B. 1039, 1040-1041 (1959). (*Kaiser Steel Corp.*, in turn, overruled the Board's prior decision in *Namm's, Inc.*, 102 N.L.R.B. 466 (1953). 125 N.L.R.B. at 1041 n.2.)

til after his return to the unit in 1986; although petitioner had denied Ruppelt a withdrawal card in 1972 and he had thereafter ceased to pay union dues, his name had been carried on the Company's seniority lists while he was a foreman. Pet. App. 35a.[4]

3. The court of appeals enforced the Board's order. At the outset, the court rejected the Company's contention that the collective-bargaining agreement left petitioner with no discretion to withhold a withdrawal card from a member who had satisfied his financial obligations to the union. The court explained that, under the contract, the member was required to obtain such a card in accordance with petitioner's constitution, which provided that petitioner "may" issue the card if the member has satisfied those obligations. Pet. App. 8a-10a. Thus, the court concluded, the agreement and the constitution "mean exactly what the Board found them to mean: that [petitioner] has 'substantial discretion' in deciding whether to issue a withdrawal card." *Id.* at 10a.

The court also upheld the Board's determination that the agreement violated Section 8(a)(3) of the Act by unlawfully encouraging union activity. It was reasonable, the court found, for the Board to conclude that the agreement resulted in disparate treatment of employees with respect to employment, since the agreement created a distinction between employees—regarding seniority, job security, and the opportunity to work—based upon the employees' actions between their transfer or promotion and their return to the bargaining unit. Pet. App. 12a-13a.

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[4] The Board found that no timely charge had been filed against the Company with respect to Ruppelt's January 14, 1986, layoff; consequently, it did not find an unfair labor practice against the Company based on that layoff. Pet. App. 34a.

The court also found that the Board acted reasonably in concluding that this disparate treatment encouraged union membership: to assure preservation of their seniority in accordance with the contract, employees were required either to pay union dues after transfer or promotion (when neither the law nor the contract compelled such payment as a condition of employment) or, in order to increase their chances of obtaining a withdrawal card, to provide support and assistance to the union before transfer or promotion. *Id.* at 12a-13a.

The court also upheld the Board's determination that no statutory policy sustained such a contractual provision. Pet. App. 11a-16a. The court explained that "[t]he only policy seemingly relevant, that of insulating employees' jobs from their organizational rights and allowing 'employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood,' [*Radio Officers Union* v. *NLRB*, 347 U.S. 17, 40 (1954)], bolsters, rather than undermines, the Board's decision." Pet. App. 13a-14a.[5]

Finally, the court concluded that Section 10(b) of the Act did not bar an unfair labor practice proceeding. The court noted that the six-month period provided by Section 10(b) begins to run "from the date a final and unequivocal adverse employment decision is made and communicated to an employee." Pet. App. 16a. Here, the court continued, there had been no adverse employment decision in 1972, since the

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[5] The court noted that the Board had reversed its position on the legality of provisions of the type at issue in prior decisions, but ruled that the Board's interpretation was nevertheless entitled to deference. Pet. App. 14a-17a n.10.

denial of a union card related only to union membership, and Ruppelt's decision to cease paying dues was not an action of the employer or the union. The court concluded that the decision to take action adverse to Ruppelt with respect to his employment occurred in 1986 and that the Board's order was properly limited to unfair labor practices within the six-month periods preceding the filing of charges against petitioner and the Company. *Id.* at 16a-17a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. Further review by this Court is not warranted.

1. a. Section 8(a)(3) of the Act makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization," except that an employer and a union may agree to a union-security provision meeting specified statutory standards. An employer and a union may agree to make continued employment contingent upon an employee's satisfaction of the union's uniformly imposed financial obligations ("initiation fees" and "periodic dues"). Section 8(b)(2) prohibits a union from causing or attempting to cause an employer to discriminate against an employee in violation of Section 8(a)(3).

While the proviso to Section 8(a)(3) of the Act permits agreements conditioning *continued employment* upon an employee's satisfaction of certain financial requirements, it does not allow an employer and a union to agree to other forms of discrimination

—such as granting or withholding seniority—on the basis of union membership or union activity. See *Radio Officers* v. *NLRB*, 347 U.S. at 39. The Act also prohibits disparate treatment on the basis of whether union members engage in union activities or support the union. As long as employees covered by union-security provisions satisfy their financial obligations to the union, they are free to "be good, bad, or indifferent members" without encountering discrimination in terms or conditions of employment. *Id.* at 40.[6] Finally, a union-security clause may not be given retroactive effect. *NLRB* v. *International Union, Auto Workers, Local 291*, 194 F.2d 698, 701-702 (7th Cir. 1952); *Eclipse Lumber Co.*, 95 N.L.R.B. 464, 467 & n.5 (1951), enforced, 199 F.2d 684, 685 (9th Cir. 1952).

In light of these principles, Section 8(a)(3) may reasonably be construed to prohibit the contract provision at issue. Under that provision, when an individual returns to a bargaining unit after having been promoted or transferred from it, he is entitled to recover previously accrued seniority only if he has paid union dues during the period he was outside the unit or has obtained a withdrawal card. It was reasonable for the Board to conclude that each alternative violates Section 8(a)(3). First, for those individuals denied withdrawal cards, the provision discriminates, in terms of accrued seniority, between individuals who engage in the union activity of paying dues and those who do not. The proviso to Section

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[6] Indeed, they need not be full members of the union, so long as they pay the initiation fees and dues. " 'Membership' as a condition of employment is whittled down to its financial core." *NLRB* v. *General Motors Corp.*, 373 U.S. 734, 742 (1963).

8(a)(3) does not protect such an agreement, since it protects only those contractual provisions that make continued employment in a bargaining unit contingent upon the payment of union dues during the period of that employment. The contract at issue here, by contrast, conditions the retention of seniority (not employment) on the payment of dues during a period when employment is not contingent upon such payment. Second, under petitioner's constitution, the grant of a withdrawal card is discretionary; thus, the threat that a withdrawal card will be withheld creates an incentive for employees to provide support to the union beyond mere satisfaction of financial obligations.

The Board's determination that the agreement unlawfully discriminated on its face against those in Ruppelt's position embodied a reasonable interpretation of the Act. Consequently, the court of appeals was correct in upholding that determination. *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 497 (1979). Contrary to petitioner's suggestion (Pet. 6-7), no different standard of review is appropriate because the Board has changed its position on this issue in the past. See note 3, *supra*. "An administrative agency is not disqualified from changing its mind; and when it does, the courts still sit in review of the administrative decision and should not approach the statutory construction issue *de novo* and without regard to the administrative understanding of the statute[]." *NLRB* v. *Iron Workers Local 103*, 434 U.S. 335, 351 (1978). "[A] Board rule is entitled to deference even if it represents a departure from the Board's prior policy." *NLRB* v. *Curtin Matheson Scientific, Inc.*, 110 S. Ct. 1542, 1549 (1990) (upholding Board rule formulated after several changes in position).

See *NLRB* v. *Best Products Co.*, 765 F.2d 903, 910-913 & nn.8-9 (9th Cir. 1985).

b. Petitioner contends (Pet. 7) that Section 8(a)(3) does not prohibit an agreement requiring statutory supervisors—who are excluded from the Act's definition of "employee," 29 U.S.C. 152(3)—to pay dues to preserve their seniority. This contention is not properly before this Court, because it was never raised before the Board, and Section 10(e) of the Act (29 U.S.C. 160(e)) prohibits petitioner from raising it here. *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 666 (1982). Section 10(e) provides that "[n]o objection that has not been urged before the Board * * * shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." The court of appeals rejected petitioner's contention (Pet. App. 11a-12a nn.5-6) without passing on the Section 10(e) issue. However, as *Woelke & Romero* makes clear, the bar of Section 10(e) is jurisdictional.

In any event, petitioner's reliance upon the statutory exclusion of supervisors from the definition of "employee" is misplaced. As the court of appeals recognized (Pet. App. 11a n.5, 12a n.6), petitioner was not held liable on the basis of discrimination against a supervisor as such; the unlawful discrimination occurred when Ruppelt had lost his status as a supervisor and was seeking to return to his status as an employee in the bargaining unit. In that capacity, he was entitled to statutory protection. *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 182-187 (1941). Section 8(a)(3) prohibits discrimination in employment based upon union activity predating the employment. As the court of appeals noted, "[i]t is the timing of the disparate treatment regarding employment that

is important—not the timing of the disparate treatment's cause—and in this case the disparate treatment does not occur until the affected individuals are statutory employees, ex-supervisors returned to the fold of the bargaining unit." Pet. App. 11a n.5.[7]

Even if the Act's exclusion for supervisors were construed to protect agreements requiring supervisors to pay union dues to preserve accrued seniority, it would not sustain the contractual provision at issue, for two reasons. First, that provision was not limited to individuals who leave the bargaining unit to become supervisors; it applied equally to those promoted to rank-and-file positions outside the bargaining unit. Since the clause, on its face, did not distinguish between supervisors and non-unit statutory employees, the Board reasonably declined (Pet. App. 28a n.8) to rewrite it to draw such a distinction. Second, the agreement went beyond requiring a supervisor to pay dues at a time when he was employed in that capacity. The Board and the court of

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[7] As petitioner points out (Pet. 6), an employer may discharge a supervisor who joins a union while he is a supervisor. However, it does not follow that an employer may adopt a policy under which it will refuse to hire as employees individuals who were members of a union while they were supervisors. The latter situation involves discrimination against employees.

The statutory provisions denying protection to supervisors were designed to give employers the option of ensuring the undivided loyalty of supervisors by requiring them, on pain of discharge, to refrain from union membership or activity. *Florida Power & Light Co.* v. *IBEW Local 641*, 417 U.S. 790, 808-812 (1974). Enforcement of a contractual provision requiring supervisors to pay union dues to preserve accrued seniority would not advance that purpose. To the contrary, the effect would be to encourage supervisors to engage in union activity while they are supervisors.

appeals both noted (Pet. App. 8a-12a, 31a n.13) that the provision giving petitioner discretion to issue a withdrawal card to an employee leaving the unit, thereby excusing him from paying dues to preserve seniority, encouraged the individual to stay in petitioner's good graces while still an employee in the unit. Thus, even as applied to an individual (such as Ruppelt) who became a supervisor, the agreement tended to encourage union activity at a time the individual was not a supervisor.

c. Contrary to petitioner's contention (Pet. 6, 7-8), the Board's determination did not rest on the proposition that supervisors have a statutory right to retain seniority previously accrued when they worked in the bargaining unit; rather, the Board ruled that, regardless of its source, seniority could not be made contingent on financial or other support for the union. Thus, the Board's decision is in no way inconsistent with *Cooper* v. *General Motors Corp.*, 651 F.2d 249 (5th Cir. 1981). See Pet. 8. In *Cooper*, the court upheld a contract provision that precluded *all* supervisors from accumulating seniority while holding non-unit positions and did not distinguish between supervisors on the basis of union activity or membership. The fact that Ruppelt may not have enjoyed "vested seniority rights" does not mean, as petitioner suggests (Pet. 8), that the Act conferred no protection from a discriminatory withdrawal of seniority.

Nor is there any inconsistency between the decisions below and *Jensen* v. *Farrell Lines, Inc.*, 625 F.2d 379 (2d Cir. 1980), cert. denied, 450 U.S. 916 (1981). See Pet. 6. In *Jensen*, the Second Circuit held that requiring supervisors to pay union dues in order to retain their positions as supervisors did not violate the First Amendment, 625 F.2d at 387-389; the question whether such a requirement would vio-

late the Act was not before the court, *id.* at 381 n.1. In any event, even if supervisors may lawfully be discharged for refusing to pay union dues, it does not follow that, if they fail to pay dues and are retained as supervisors, their failure to pay dues may be made the basis for a denial of seniority when they subsequently become rank-and-file employees. As the court of appeals noted (Pet. App. 11a-12a n.6), discrimination against *supervisors* for their conduct in a supervisory capacity is clearly distinguishable from discrimination against rank-and-file *employees* for their prior conduct as supervisors.

2. There is no merit in petitioner's contention (Pet. 8-10) that Section 10(b) foreclosed the Board's determinations. Section 10(b) provides, in pertinent part, that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge and the service of a copy thereof upon the person against whom such charge is made." Ruppelt filed a charge against petitioner on June 24, 1986. Pet. App. 6a. Thus, the Board was free to adjudicate unfair labor practice charges arising from petitioner's conduct on or after December 24, 1985. The Board determined that after that date petitioner committed unfair labor practices (1) by maintaining the unlawful contractual provision and (2) by causing the Company to lay off Ruppelt after that date (see Pet. App. 33a).

There is no conflict between this case and *Local Lodge No. 1424, Machinists* v. *NLRB*, 362 U.S. 411, 416 (1960). In *Local Lodge No. 1424*, the union and the employer entered a contract containing a facially valid union security provision at a time when the union lacked majority support—an action which, if timely challenged, would have been adjudicated an unfair labor practice. More than six months later, a

charge was filed alleging that continued enforcement of the clause violated the Act. This Court held that the charge was time-barred, explaining (*id.* at 419 (emphasis added)):

> *Where * * * a collective bargaining agreement and its enforcement are both perfectly lawful on the face of things*, and an unfair labor practice cannot be made out except by reliance on the fact of the agreement's original unlawful execution, an event which, because of limitations cannot itself be made the subject of an unfair labor practice complaint, we think that permitting resort to the principle that § 10(b) is not a rule of evidence, in order to convert what is otherwise legal into something illegal, would vitiate the policies underlying that section.

The Court took care to distinguish situations involving "an agreement invalid on its face or * * * one validly executed, but unlawfully administered." *Id.* at 423. That is this case. Both the Board and the court of appeals found the clause unlawful on its face (Pet. App. 17a-18a n.12, 35a); thus, the reasoning of *Local Lodge No. 1424* did not preclude the Board from holding that the maintenance and enforcement of the clause during the limitations period was unlawful.

Petitioner's reliance (Pet. 9) on *Postal Service Marina Center*, 271 N.L.R.B. 397 (1984), is likewise misplaced. The Board held in that case that the statutory limitations period begins to run when an employee receives unequivocal notice of a final decision to take adverse action against him, not when the adverse action is actually taken. 271 N.L.R.B. at 400. However, this holding was limited to "unconditional and unequivocal decisions or actions" and does not

apply to actions conditioned on future events that may never occur. *IATSE Local 659*, 276 N.L.R.B. 881, 882 (1985). In this case, although Ruppelt was denied a withdrawal card and stopped paying dues in 1972, neither petitioner nor the Company took any action with respect to his employment at that time. In fact, as the Board noted (Pet. App. 35a), the Company continued to show Ruppelt's name and accrued seniority on its seniority list until he was terminated as a foreman. Accordingly, he had no unequivocal notice that he would be denied seniority when and if he tried to return to the bargaining unit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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